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FEDERAL GOVERNMENT, STATE GOVERNMENTS AND NATURAL RESOURCES

DANIEL J. DYKSTRA*

During the heat of last year's political campaign, President Eisenhower repeatedly accused the Truman Administration of a desire to secure federal domination of the people through federal domination of their natural resources.[1] He coupled this accusation with the assertion that if elected he would bend his effort to place greater control over our natural resources in the hands of the local governments; he would, to use his own words, work out a "partnership among the federal and state governments and the people" for control and development of our forest and water resources and our national domain.[2]

While on their surface these words offer a happy, if oversimplified, solution to an extremely vexing problem, it is disturb-

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1. In Portland, Oregon, on October 7, 1952, President Eisenhower referring specifically to water resources, said:

> "The people of this area must have a strong voice in the planning and administration of these great projects, we don't want Federal domination of the people through Federal domination of their natural resources."

Later in this same speech he added in referring to public lands:

> "Nowhere has the Administration shown more clearly this desire to regiment our people and our resources than in this field of public land policy. Your only clear assurance against such control is to elect a national administration which is friendly to the states, which will come to you as a partner, not as a patron or a boss . . . ." N. Y. Times, Oct. 8, 1952, pp. 22-23.

2. N. Y. Times, Oct. 8, 1952, p. 22, col. 1. In Seattle on Oct. 6, 1952, the evening prior to the Portland speech referred to in footnote 1, Eisenhower outlined at some length his concept of federal-state relationships in the area of natural resources. Among other things, he said:

> "The first thing a new administration should do is bring out state governments more into the picture. One of the worst things about our National Administration has been its unwillingness to recognize the great progress that has been made in able state administration. . . .
>
> "Local and state governments should assume a greater influence in the planning, in the execution of plans, and in the administration of resource development projects, and when Federal projects have demonstrated that they are paying for themselves, local and state governments should have an opportunity to take over the financing, take over the projects for their own people, and get their region out of hock to the Federal Government.
>
> "To do this we need an administration which believes in keeping government close to the people, we need an administration made up, not of whole-hog men, but of men who are eager to see that the states and localities are allowed and encouraged to do their jobs." N. Y. Times, Oct. 7, 1952, p. 22.

ing to note that already special interests are viewing these promises as offering unlimited opportunities for private exploitation and control.[3] Repeated assertions are made by groups whose economic welfare is too closely aligned with the causes they espouse to be regarded unsuspiciously, that the Federal Government controls too much grazing land, too many mineral resources, and too many forest reserves. These assertions are coupled with demands that control over such lands and resources be returned to the states, or better still, be opened up for private ownership.[4] Implied, of course, in all these demands and assertions is the assumption that heretofore all control has been vested in the national government and that the partnership concept, which concept to many appears to mean exclusive local control, is entirely new. The truth is, however, that from time to time large tracts of forest lands and vast sections of the national domain have been turned over by the Federal Government to the states and in too many instances such resources have been destroyed and exploited because no voice, no authority, was raised in effective protest.[5] Furthermore, in many instances the "partnership concept" of control has been employed, and again, unfortunately, the results have been too often disastrous because lines of authority were not clearly drawn and policies and objectives were in conflict.

It is because this is so that this Article is written, for it is hoped that the portrayal of an historical example of the consequences which stem from hastily conceived legislation pertaining to natural resources will point up the necessity for careful planning. It is also hoped that this presentation will illustrate that such legislation, and of course its administration, must recognize the exist-

3. For evidence of this fact see: Begeman, *Season for Plunder, The Public Domain,* New Republic, March 23, 1953, pp. 13-16; De Voto, *The Easy Chair, Billion Dollar Jackpot,* 206 Harpers 53, February, 1953. While the author willingly admits these sources cannot be classified as unbiased, nonetheless, the data contained in these articles is worthy of attention and concern.

4. President Eisenhower may well have encouraged those who cry for increased private ownership of lands now held by the Federal Government when, in referring to the Truman Administration, he said:

> "They have reached out to acquire more and more private land with more and more dominating control. They have preached federal control over private lands with rules written in Washington and administered from Washington." N. Y. Times, Oct. 8, 1952, pp. 22-23.

5. The fact that vast resources have from time to time been turned over to the states is vividly illustrated by the fact that in 1850 title to three-quarters of the land in the United States was in the Federal Government. Today that amount has shrunk to less than one-quarter. For an example of the history of vast forest reserves which were turned over to a state and ruthlessly destroyed without adequate returns to the state, see: Dykstra, *Legislative Efforts to Prevent Timber Conversion: The History of a Failure,* 1952 Wis. L. Rev. 461.

ence of powerful special interest groups who lose no opportunity to exploit disagreements as to policies and conflicts as to authority. Whereas this example is confined to certain areas located in northwestern Wisconsin, it is the writer's opinion that the implications involved in this account are neither unique nor local.

The precise setting for this study is the lands granted to the state of Wisconsin for use in building a railroad from Madison or Columbus, located in the south central part of the state, to the St. Croix River which borders the state on the northwest, and thence to the west end of Lake Superior. The first grant for this project was contained in a bill passed by Congress in 1856.[6] This measure stipulated that "[t]here be, and is hereby, granted to the state of Wisconsin for the purpose of aiding in the construction of a railroad" as described above "every alternate section of land designated by odd numbers for six sections in width on each side of the road respectively."[7] Although the first clause of this enactment appeared to be an outright grant to the state for the purpose designated, the subsequent sections added several restrictions and qualifications, the most important of which provided that "if said roads are not completed within ten years, no further sales shall be made, and the land unsold shall revert to the United States."[8]

In 1864 this act was supplemented by a further measure which increased each alternate area granted to the state from six sections to ten sections along the greater part of the proposed route.[9] In addition, the time for completion of the railroad, and hence the date for reversion to the United States Government, was extended for five years.[10]

In the same year the above measure was enacted, the Wisconsin legislature obviously operating on the theory that the state had exclusive control over the designated sections, at least until the reversion date, enacted a measure designed to prevent timber conversion on these lands.[11] This measure authorized the officials of the St. Croix-Lake Superior Railroad to prosecute civilly in the name of the state any parties guilty of cutting timber on the railroad grant, and it provided that should such prosecutions prove successful, triple damages should be recovered. Furthermore, the

6. 11 Stat. 20 (1856).
7. 11 Stat. 20 (1856).
8. 11 Stat. 20 (1856). The reversionary clause specifically states: ". . . if said roads are not completed within ten years, no further sales shall be made, and the land unsold shall revert to the United States."
9. 13 Stat. 66 (1864).
10. 13 Stat. 67 (1864).
11. Wis. Laws 1864, c. 277.

railroad was authorized to bring criminal proceedings against the guilty parties. Finally, power was given to the railroad to seize any timber or materials taken from the land and dispose of them at public auction. Any sums received from such sales were to be paid into the state treasury.

This broad delegation of enforcement power to a private corporation devoid as it was of provisions for supervision is most remarkable. It is certainly some evidence that at that date no reliable pattern of public enforcement had been developed and it is also an indication that spokesmen for the railroad possessed an effective voice, for by this measure complete authority and responsibility was given to a railroad over a vast area which had been placed as a trust in the hands of the state. While it is true that these lands were given for the benefit of this railroad, it is also nonetheless true that such benefit was to be conferred only upon the performance of certain conditions.

Despite the scope of authority thus delegated to the St. Croix-Lake Superior Railroad there is much data which shows that this company made little effort to curtail the illegal cutting of timber on the land grant. The fact that the Wisconsin legislature saw fit in 1869 to repeal the 1864 statute is in itself evidence that all was not satisfactory.[12] This evidence is strengthened by the fact that the measure which was substituted for the one repealed not only placed complete enforcement responsibility in the hands of the state but also provided that the agents appointed pursuant to its terms should commence proceedings "without unnecessary delay" against the railroad company and its representatives for the recovery of all money and property collected by them under chapter 277 of the Laws of 1864.[13]

More striking testimony as to the ineffective manner in which the railroad policed the grant is found in the report of the first state agent appointed under authority of the statute passed in 1869. This report stated that in the winter of 1868 and 1869 surveyors estimated that over a total of 29,000,000 feet of timber was illegally taken on that part of the grant located near Lake Superior and over 8,500,000 feet was taken in the St. Croix area. It was further estimated that the entire tract since being given to the state had

12. Wis. Laws 1869, c. 47.

13. It is interesting to note that this measure was sponsored by Henry D. Barron, speaker of the assembly. Barron's assembly district was made up of the six counties in which a great portion of the grant was located. His familiarity with conditions in the area in question no doubt convinced him that a change was desirable. See Wis. Assembly J., 189, 439 (1869).

been unlawfully shorn of some three hundred million feet of timber.[14]

As previously stated, the act of 1869 attempted to place complete enforcement authority over the railroad lands in the hands of the state. It specifically provided that the governor could appoint agents who were, incidentally, to hold office at his pleasure, to protect the timber lands.[15] These agents were given power to seize any logs and timber wrongfully cut or carried away from the railroad grant, and they were authorized to sell the same at public auction to the highest bidder for cash. Logs cut prior to the enactment could be seized or the agents in their discretion could "commute or compromise for the same at a rate of not less than two dollars and fifty cents per thousand feet." This statute also provided that it was the duty of the agents to prosecute all guilty parties in the name of the state and recover from such persons triple damages for wrongs and trespasses done. Finally, the law empowered but did not compel the agents to bring criminal proceedings against those guilty of conversion.

If the sponsors of this enactment thought that they had found the solution to protecting the railroad grant, they were soon disillusioned. Sam Harriman, the first agent appointed under the act, lost no time in reporting that he was encountering open and active hostility from the lumber interests.[16] What is more, he placed the responsibility for much of this hostility squarely on the heads of the federal land agents. It appears that despite the grants made to the state, the United States General Land Office issued instructions to the Register and Receiver of the local land offices that they should continue their supervision of the St. Croix-Lake Superior railroad lands.[17] Concerning the manner in which these Federal officers were discharging such duties, Harriman in April of 1869 wrote:

> "I discovered . . . that their agent was settling with parties at any figures they might offer and as I have reason to believe

14. See report of Sam Harriman to Gov. Fairchild, Nov. 26, 1869 (Wis.), Executive Records, Timber Agents, Box 1. This report and all other correspondence subsequently cited are on file in the Wisconsin Historical Library, Madison, Wisconsin.

15. Wis. Laws 1869, c. 46, s. 1.

16. See letter Harriman to Fairchild, April 7, 1869, (Wis.) Executive Records, Timber Agent, Box 1.

17. See copy of letter sent by J. M. Edmunds, Commissioner of the General Land Office, Interior Department, to Register and Receiver of the land office, Falls of St. Croix, Wisconsin, Nov. 29, 1865. For references to similar instructions, see copy of letter dated March 15, 1869, from Register and Receiver to Harriman; also see copy of letter dated March 27, 1869, from J. S. Wilson, Commissioner of the General Land Office to Register and Receiver, Falls of St. Croix. These copies are on file in (Wis.) Executive Records, Timber Agent, Box 1.

in some cases for five per cent of the amount actually cut and has assured them that a Government rect. [receipt?] was good against any State Agent."[18]

In November, 1869, he further observed:

"The men who had been trespassing upon these lands were entirely satisfied with the way they had been dealt with by land officers and did not deem a change necessary."[19]

In view of the fact that the state from 1854 to 1869 had taken no effective steps to control the illegal cutting of timber on the lands placed in its hands for the benefit of the railroad, it is not surprising that the Federal Government made at least feeble efforts to fill the vacuum. The fact that this was done, however, considerably complicated the picture, for the Federal Government was understandably reluctant in 1869 to surrender its authority. This reluctance was quickly revealed. Within two weeks after executive approval of chapter 46 of the Laws of 1869,[20] Harriman wrote to the Register and Receiver of the Federal Land Office located at St. Croix Falls informing them that he had been appointed to protect the St. Croix-Lake Superior railroad grant and inquired of them by what authority they also claimed such right.[21] The answer received referred to instructions issued to them by the General Land Office on the eighteenth of October, 1867, and it then concluded:

"In reply, we have to state that we have heretofore, and still do claim the right to protect these lands, and have collected moneys for timber and logs cut there on."[22]

Evidently anticipating this reply, Harriman meanwhile had written to the Wisconsin governor, Governor Fairchild, requesting him to raise with the Commissioner of the General Land Office or with the Secretary of the Interior the question of the authority asserted by the agents at the St. Croix Falls Land Office.[23] No doubt as a result of such inquiry, J. S. Wilson, Commissioner of the General Land Office, wrote to the officials of the Land Office at St. Croix Falls that while they were to continue to protect the land as per previous instructions, this did not mean that Wiscon-

18. Report from Harriman to Fairchild, April 7, 1869, (Wis.) Executive Records, Timber Agent, Box 1.

19. Report from Harriman to Fairchild, Nov. 26, 1869, (Wis.) Executive Records, Timber Agent, Box 1.

20. This measure was approved March 3, 1869.

21. See copy of letter, Harriman to Register and Receiver of Land Office, Falls St. Croix, Wisconsin, March 12, 1869, on file in (Wis.) Executive Records, Timber Agent, Box 1.

22. See copy of letter from Register and Receiver of the Land Office, Falls St. Croix, Wisconsin to Harriman, dated March 15, 1869, on file in (Wis.) Executive Records, Timber Agent, Box 1.

23. Letter Harriman to Gov. Fairchild, March 12, 1869, (Wis.) Executive Records, Timber Agent, Box 1.

sin did not also have the right to protect such land. These officials were instructed, therefore, to cooperate and act in conjunction with the state agents.[24]

What followed this instruction nicely illustrates that a partnership, *i.e.* cooperation, between the state and federal governments cannot be created by mere words or good intentions. While it is true that Harriman's first report to Governor Fairchild asserted that the conflict had been alleviated by Commissioner Wilson's letter,[25] the unstable basis upon which this cooperation rested soon became apparent. On June 10, 1869, Wilson supplemented his instructions to the St. Croix Land Office by directing that all money collected "[w]hether on compromise or from a public sale of the timber and whether by your acting alone or conjointly with an agent appointed by the Governor of Wisconsin" must be deposited in favor of the United States.[26] When word of these instructions reached Harriman, he immediately wrote to Governor Fairchild's secretary stating that the effect of these orders was simply to place the whole matter of protection in the hands of the Federal Government. He then added:

> "Against this ruling and instruction of Col. Wilson I must respectfully protest. It is arbitrary, unfair and a further license to the land offices to connive at the plundering of these lands. . . .
>
> "If the present instruction from the General Land Office is to stand I desire to be relieved from further serving the state as agent. It becomes a sinecure and my whole duty would be to stand by and see these Lands plundered without my having any means of redress."[27]

This letter brought the question of conflicting federal-state control to a head. Shortly after its receipt Governor Fairchild was in Washington holding a series of conferences with Commissioner Wilson. As a result of those meetings, the Governor was able to write Harriman on July 3, 1869 that an agreement had been reached with the Federal Government.[28] This settlement, which incidentally was signed by J. D. Cox, Secretary of the Interior, pro-

24. See copy of letter J. S. Wilson to Register and Receiver, Falls of St. Croix, Wis., March 27, 1869, (Wis.) Executive Records, Timber Agent, Box 1.

25. See letter Harriman to Gov. Fairchild, April 19, 1869, (Wis.) Executive Records, Timber Agent, Box 1.

26. See copy of letter Wilson to Register and Receiver, Land Office, Falls St. Croix, Wis., June 10, 1869, (Wis.) Executive Records, Timber Agent, Box 1.

27. See letter Harriman to Col. E. E. Bryant dated June 19, 1869, (Wis.) Executive Records, Timber Agent, Box 1.

28. This letter is on file in the (Wis.) Executive Records, Timber Agent, Box 1.

vided that the state should have complete authority to protect the timber on the railroad grant, and its agents were to pay into the state treasury any money collected from trespassers on such land. Reports were to be made "at least monthly," however, to the Department of Interior as to the amount of receipts collected, and in case the railroad grant was not renewed this money was to be turned over to the United States Government.[29]

This last provision raised an issue which considerably complicated the enforcement problem and the question of federal-state relationships. As already noted, the grant made in 1856 stipulated that if the railroad was not completed within ten years the land should revert to the United States. In 1864 this period was extended until 1869.[30] At the time of the supposed settlement between Governor Fairchild and the Commissioner of the General Land Office, therefore, the deadline set by this latter act had already expired and despite valiant efforts by Wisconsin's Congressional delegation to secure a renewal of the grant, Congress had taken no action. Thus, while the above agreement quieted for a time the dispute between the federal and state agents, the continued failure of Congress to enact a measure extending the grant precipitated a

29. A copy of this agreement is on file in the (Wis.) Executive Records, Timber Agent, Box 1. The agreement provides as follows:

"Whereas, it has been represented by Gov. Lucius Fairchild, the Governor of Wisconsin, that there are extensive spoilations on the public lands in Wisconsin, both on the even and odd numbered sections 'in place' and 'indemnity' within twenty mile limits, along the line of a certain Railroad in that State, in which the grant has failed by reason of the Road not having been completed within the period stipulated in the grant, and—Whereas, it is represented by the said Governor that the authorities of the State will undertake the protection of the timber on the said odd sections, and the amount of stumpage, or the amount of sale, where compromise is inexpedient, shall be paid into the Treasury of the State, according to the Act of the Legislature of Wisconsin approved March 3rd, 1869, entitled 'An Act to protect the lands and timber thereon, granted to the St. Croix and Lake Superior Railroad Company,' being the Road first above referred to, (by acts of Congress approved June 3, 1856, and May 5, 1864) with the distinct understanding: (1st), That there shall be a prompt return at least monthly in every case made by the said Governor to the Department of the Interior of the amount of the receipts from stumpage in case of compromise or sale by the State authorities of the timber in said odd sections, for which amount the State shall be liable to the United States Government in the event that said Railroad Grant is not renewed and extended by Act of Congress, and the said Governor, as the Chief Executive of the State, hereby agrees that in regard to any claim either for the five per cent fund or for swamp indemnity, the said State shall be charged with the amount received by the State from stumpage or sale as aforesaid, unless hereafter relieved from such liability by express Act of Congress extending the said Railroad Grant or by other remedial legislation. (signed) Lucius Fairchild, Gov. of Wis., Jos. S. Wilson, Commissioner of the General Land Office; (approved) J. D. Cox, Sec. of the Interior.

30. See notes 9 and 10 *supra,* and text thereto.

a judicial contest which eventually found its way to the United States Supreme Court.[31]

The manner in which this contest was arranged was evidence in itself of the exploitive temper then prevailing concerning the forest resources of the country, for the history of the conflict shows that it was a deliberate and carefully contrived plan entered into by Mr. Harriman and certain lumbermen in order that the lumbermen could test the authority of the state to seize certain logs which they had cut upon the St. Croix-Lake Superior grant. In May, 1871, Harriman wrote Governor Fairchild's secretary that such a plan was in the wind.[32] Three weeks later he again wrote saying that an agreement had been arranged. He was to take possession of the logs and the converters were to bring a replevin action against him.[33]

The strategy which the trespassers intended to use was revealed in a letter sent by Governor Fairchild to the Secretary of the Interior.[34] Whereas, the Governor wrote, they realized they can show no title to the logs in question it is their plan to place upon Harriman the burden of showing lawful authority in him to take the logs out of their hands. The fact that the grant to the state had expired was naturally to form the basis of their argument. To strengthen the position of the State's agent, therefore, the Wisconsin Governor requested the Secretary to send a wire to Harriman authorizing the seizure of the logs if such seizure had not been made and approving such seizure in case he had already acted. A few days later the Interior Department sent the requested dispatch.[35]

In view of this prompt reply and the cooperation shown by the Federal Government after the settlement had been reached authorizing the state to protect the railroad grant, it is surprising to find that the Acting Secretary of the Interior informed Governor Fairchild on July 8, 1871, that upon the advice of the United States Attorney General he had directed the Commissioner of the General Land Office to terminate the agreement entered into in 1869 between Commissioner Wilson and the Governor.[36] To understand

31. Schulenberg v. Harriman, 21 Wall. 44 (U.S. 1874).
32. See letter Harriman to Bryant, May 17, 1871, on file in (Wis.) Executive Records, Timber Agent, Box 1.
33. See letter Harriman to Bryant, June 8, 1871, on file in (Wis.) Executive Records, Timber Agent, Box 1.
34. See letter Fairchild to Columbus Delano, June 13, 1871, on file in (Wis.) Executive Records, Timber Agent. Box 1.
35. See copy of telegram sent by B. R. Cowen, Acting Sec. of Interior, on file in (Wis.) Executive Records, Timber Agent, Box 1.
36. See letter B. R. Cowen to Governor Fairchild dated July 8, 1871, on file in (Wis.) Executive Records, Timber Agent, Box 1.

and appreciate this abrupt action it is necessary to note the progress thus far made in the pending litigation.

The trespassers involved were lumbermen from Minnesota.[37] The logs which they had cut on the St. Croix-Lake Superior railroad grant had been placed by them in a boom at Stillwater, Minnesota. It was there that Harriman seized them under sanction of a Minnesota law which permitted log owners to obtain immediate possession of any of their logs which were illegally retained by others.[38] Following this seizure, the converters, as planned, brought replevin proceedings in the District Court of Washington County, Minnesota. Upon Harriman's petition the suit was transferred to the United States Circuit Court.[39] At this point the United States Attorney General considered the interest of the United States in the grant sufficient to order Cushman K. Davis, United States Attorney for the Minnesota District, to aid in Harriman's defense. Meanwhile, Wisconsin secured the services of a young man, John C. Spooner by name, who was subsequently destined to become one of its outstanding attorneys and statesmen.

It was shortly after the appointment of these two men that the federal-state controversy again reared its head. While John C. Spooner obviously entered the suit to protect Wisconsin's title to the railroad grant, Cushman K. Davis quickly revealed that he considered this an action to assert and maintain the authority of the United States over these same lands. In fact, within a few days after his appointment he wrote to Attorney General Ackerman advising him that the entire matter ought to be taken out of the hands of the state.[40] Upon receipt of this letter, Ackerman, apparently in complete accord with the suggestion contained therein, wrote the Acting Secretary of the Interior advising him as to this attitude and informing him further that in his opinion the agreement of July 3, 1869, between Governor Fairchild and Commissioner Wilson[41] was a violation of law. If not terminated, the Attorney General maintained, it would jeopardize the *exclusive claim* of the Federal

37. These lumbermen represented the firm known as Schulenberg, Boeckeler and Co. For an account of the case in the lower court see: Schulenberg v. Harriman, 21 Fed. Cas. 749, No. 12,486 (C.C.D. Minn. 1872).

38. Minn. Laws 1856, c. 59.

39. Schulenberg v. Harriman, 21 Wall. 44 (U.S. 1874).

40. See copy of the letter Barron to Harriman, July 20, 1871, on file with (Wis.) Executive Papers, Timber Agent, Box 1. Barron, who had for years been an assemblyman from the district in which much of the railroad grant was located, *supra* note 13, was in 1871 serving in Washington as head of the Fifth Auditor's Office, Treasury Dep't. His interest in the railroad grant caused him to keep track of developments in Washington and he frequently reported his findings to the Wisconsin Governors.

41. Note 29 *supra*.

Government to the land.[42] As already observed, this advice bore fruit, for upon its receipt the Acting Secretary of the Interior terminated the agreement.[43] The suggestion that the conduct of the case be left entirely to the United States Government was rejected, however, for John C. Spooner continued to represent Harriman and the State of Wisconsin.

Any effects the termination of the agreement may have had in continuing the jurisdictional fight between the state and federal governments were soon dissolved by the results of the litigation in which Harriman was involved.[44] Although it was vigorously argued that Wisconsin no longer had title to the land because the period designated in the grants had elapsed, the Circuit Court for the Minnesota District, Justice Miller and Judge Dillion hearing the case, ruled that title was still in the state. This was so, the court asserted, because there had been no law passed by Congress, no judicial proceedings, and no other act by the Federal Government which effectuated a forfeiture. Legal title thus remained where it was placed by the acts of 1856 and 1864 and thus Wisconsin had authority to prosecute the plaintiffs as trespassers. As a result of instructions in accordance with this reasoning, a verdict of over $16,000 was entered for Harriman and judgment was rendered on the same.[45]

As soon as this judgment was entered, it is interesting to note that C. K. Davis wired Governor Washburn of Wisconsin urging him to "settle the heavy damages we have obtained."[46] If no settlement is made, Davis asserted, the plaintiffs would surely take the matter up to the Supreme Court. That, however, was precisely what Wisconsin desired, for only in that way could final determination be made as to its claim to title. As a consequence the Governor

42. See letter Barron to Harriman, Aug. 3, 1871, (Wis.) Executive Papers, Timber Agent, Box 1.

43. It is interesting to note that H. D. Barron from his post in Washington wrote to Harriman that he questioned the motives of C. K. Davis in suggesting the United States Government handle the entire proceedings, but he was of the opinion that the Acting Secretary of the Interior was sincere in his desire to prosecute the trespassers. He abrogated the agreement, Barron believed, only because he was convinced it was illegal. See letters dated July 20 and Aug. 3, 1871, (Wis.) Executive Papers, Timber Agent, Box 1.

44. See Schulenberg v. Harriman, 21 Fed. Cas. 749, No. 12,486 (C.C.D. Minn. 1872).

45. Harriman reported to Governor Washburn with obvious delight that this represented a recovery of over $10.00 per thousand feet. It is evident that these damages were unusually heavy, for state agents were at this time settling with trespassers for rates which ranged from $2.50 to $5.00 per thousand. See letter Harriman to Washburn June 27, 1872, (Wis.) Executive Records, Timber Agent, Box 1.

46. See telegram Davis to Washburn, June 28, 1872, (Wis.) Executive Records, Timber Agent, Box 1.

made no efforts to reach agreement with the Minnesota lumbermen and, as predicted, the plaintiffs appealed from the judgment.

At this stage the United States Attorney General declared the Federal Government would take no further part in the proceedings. Although this pronouncement alarmed the Wisconsin Congressional delegation,[47] his decision is understandable for an affirmance of the judgment would simply place all authority over the land in the hands of the State. Thus the Federal Government had nothing to gain by continuing to prosecute the trespassers. Fortunately for Wisconsin, the concern expressed by its delegation turned out to be needless, for its interests were adequately protected by counsel. The Supreme Court affirmed the judgment in Harriman's favor.[48]

Th Court's opinion, written by Justice Field, commented on the reversionary clause in the following words:

> "The provision in the Act of Congress of 1856, that all lands remaining unsold after ten years shall revert to the United States, if the road be not then completed, is no more than a provision that the grant shall be void if a condition subsequent be not performed. . . .
>
> "And it is settled law that no one can take advantage of the nonperformance of a condition subsequent annexed to a state in fee, but the grantor or his heirs, or the successors of the grantor if the grant proceed from an artificial person; and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee . . . And the same doctrine obtains where the grant upon condition proceeds from the government; no individual can assail the title it has conveyed on the ground the grantee has failed to perform the conditions annexed."[49]

After thus expressing the law on this subject, the Supreme Court concluded that the United States Government had in no way acted to declare a forfeiture. This being true, title to the land was still in the State of Wisconsin and with it went the right protection at least so far as private citizens were concerned.

Since many states had grants for railroads and other internal improvements which had expired because of the failure to perform stipulated conditions on time, it is understandable that this decision was considered a significant one. In fact, one writer of the period stated that the *Schulenberg* case won for John C. Spooner a national reputation among railroad promoters, judges, and attorneys.[50] He then added in somewhat exaggerated terms:

47. See letter from Wisconsin Representatives to Governor Taylor, Jan. 20, 1874, (Wis.) Executive Records, Timber Agent, Box 1.
48. Schulenberg v. Harriman, 21 Wall. 44 (U.S. 1874).
49. *Id.* at 62-63.
50. See short biography of John C. Spooner written by Frank A. Flower

"To the great empire of the northwest, this suit was most important in its results. But few land grant railways were or could be completed within the periods named in the grants. What are now trunk lines had been partially built but were dead, or in doubt or uncertainty, and their promoters discouraged and frequently bankrupt because the generally accepted theory, and the rule of the departments then was that a line not completed within the time named in the act making the grant had forfeited the grant itself—or, at least, the unpatented portion of it.

"This decision, therefore, put new life and progress into the great northwest. Projected lines were resumed and completed; magnificent new territory was opened to settlement and industrial development; new cities and towns sprang into life and activity—in short, the wilderness was made to blossom as a rose; civilization was carried forward in giant strides and the entire nation was strengthened and enriched."[51]

During the time the *Schulenberg* case was being litigated it appears that the National Government adopted a hands-off policy over the grant in question. Complete enforcement authority was thus in the hands of the State. This being the case, Wisconsin had an opportunity to demonstrate what it could do without federal interference. Unfortunately, the record is a sorry one. Just as the lumber barons of the age stripped and lay bare the educational lands granted to the State,[52] so also they annually exacted heavy tolls from the railroad grant.[53]

Recognizing that this was the case, the Wisconsin legislature in 1874 amended the basic law relating to the protection of the St. Croix-Lake Superior grant, so that it provided that any person who cut or carried away any timber from these lands was guilty of larceny and upon conviction thereof could be fined up to an amount not to exceed $500 and, at the discretion of the court, could be imprisoned in the county jail for a period of from three months

found in Merryman, History of the Bench and Bar of Wisconsin (1898) Vol. II, 381-399.

51. *Id.* at 387. Flower continued his comments by adding this interesting footnote to the history of the case:

"He [John C. Spooner] was not thirty years of age when he made the defense in this famous cause; and the victory was all the greater because, shortly before, Attorney General Williams had written an official opinion holding that non-performance of the terms of a land grant operated as a reversion of the grant, and the departments and the railroads were acting on that theory. He was employed by Governor Washburn to appear before the Supreme Court in the cause to receive one thousand dollars if he won, but, if he failed, nothing—so little faith had leading attorneys and officials in the success of his theory."

52. Footnote 5 *supra.*

53. See for example reports Harriman to Fairchild, June 26, 1871; Harriman to Washburn July 13, 1873. (Wis.) Executive Papers, Timber Agent, Box 1.

to one year. This amendment also attempted to solicit public support of enforcement activities by providing that any person instrumental in causing the arrest and conviction of any party guilty of conversion should be entitled to one-half the fine imposed.[54]

While this amendment may have operated as an added threat to those who plundered the forest lands, it proved to be a feeble weapon indeed,[55] and as a consequence, in 1876 the legislature, spurred by demands from Governor Ludington,[56] enacted three measures designed to protect more effectively the railroad lands.[57] The most significant of these acts was one which provided that any person who cut or removed any timber or logs from the grant would be liable to the state in an amount ten times the value of the timber cut or logs taken. Teeth were put into this provision by giving the state authority to secure a writ of attachment against any property owned by the defendant. The measure also added that no exemption law was valid against such attachment. A further section stated that persons trespassing on the grant were guilty of a felony and subject to from six months to one year in prison and/or a fine of $250 to $1000.[58]

Since this latter provision was at variance with the penalties provided by the measure passed in 1874, the legislature repealed the earlier measure.[59] In doing so, they completely eliminated the provision which allowed individuals a share in the fine if they contributed information leading to the arrest and conviction of any parties guilty of conversion. While it is difficult to say with certainty why this stipulation was not re-enacted, it is reasonable to assume that this measure of soliciting public cooperation, which cooperation was sought for the prosecution of a criminal penalty, had not proved effective.

The final measure passed in 1876 relating to the railroad grant gives some indication that relationships between the state and its agents—which agents incidentally were primarily political appointees[60]—had not always been satisfactory. While Section 1 re-

54. See Wis. Laws 1874, c. 348.

55. Numerous reports found in the Wisconsin Executive Records reveal that the agents were reluctant to take penal action against those guilty of trespass and conversion, and as a consequence the penal statutes were seldom used. This reluctance no doubt stemmed from public hostility and the general attitude then prevailing that the trees existed for the taking not for the keeping.

56. See Governor Ludington's first annual message to the legislature. Wis. Senate J. (1876).

57. See Wis. Laws 1876, cc. 308, 335, 339.

58. Wis. Laws 1876, c. 308.

59. Wis. Laws 1876, c. 339.

60. Each time a new Governor took office he was beseiged by letters

quired agents for the first time to furnish a bond, Section 3 empowered the Governor to:

> ". . . institute proceedings such as he may be advised are adequate for the purpose to secure the collection and payment into the state treasury of any sum or sums of money heretofore collected by any person or persons on account of trespasses upon any of said lands, or which may have been received from the sale of any logs or timber cut upon or taken from said lands, . . . and not reported and paid over to the state. . . ."[61]

Reports submitted by timber agents in the years following the enactment of these measures reflect some decrease in respect to conversion activities.[62] There is little to indicate, however, that this decrease occurred as a result of these statutes, for again it appears that the penal provisions therein provided were rarely employed. If the reports present a true picture, the indicated decrease is probably attributable to the more settled conditions not only in the lumbering industry itself but in the state as a whole. As the wildcat days of logging operations drew to a close, it was natural that the legitimate operators came to regard conversion activities as an undesirable source of competition. Thus, some were moved to lend their influence to the forces attempting to combat timber thievery.[63]

Although this change of heart on the part of certain lumbering interests apparently had some effect, it must not be assumed that conversion activities ceased to be a problem. Despite the numerous acts already noted, which acts, incidentally, in themselves reflect a hit or miss approach, the evidence shows that logging operators continued to flaunt the public interest and the authority of the state throughout the closing years of the nineteenth century.[64]

Having traced the history of the St. Croix-Lake Superior railroad grant from its inception in 1854 throughout several turbulent decades, there remains for consideration an over-all appraisal of this episode and an interpretation of its significance in terms of the

which contained requests for appointments as timber agents. Many of these letters placed primary stress upon the political connections and interests of the prospective agent. See (Wis.) Executive Records, Timber Agents, Boxes 1 and 2.

61. Wis. Laws 1876, c. 335.

62. See for example the following reports on file in the (Wis.) Executive Records, Timber Agent, Box 2: Taylor to Gov. Ludington for years 1876 and 1877, Dec. 31, 1877; Taylor to Gov. Smith for 1878, Dec. 31, 1878; H. Borchsenius to Gov. Smith for 1878, Dec. 31, 1878.

63. For example James Bates, Secretary of the Union Lumbering Co., a large company located in Northwestern Wisconsin, sponsored some of the anti-trespass measures.

64. See second semi-annual report submitted by H. A. Taylor, Dec. 30, 1876, and letter of O. R. Dahl to Gov. Smith Jan. 9, 1880; also see numerous letters containing individual trespass reports sent in during the 1880's. (Wis.) Executive Records, Timber Agent, Boxes 2 and 3.

contemporary scene. In retrospect, the principal difficulties which arose to plague both the state and federal governments stemmed from three basic faults. First, there was a total failure to spell out with precision the authority which each was to exercise over the grant. While ostensibly the objective of the measures passed in 1856 and 1864 was to procure the building of a railroad, it nonetheless should have been recognized that, as drafted, both the state and federal governments would lay claim to interests in the grant. It could not, for example, be expected that Wisconsin, the direct recipient of the grant, would not seek to assert its authority. On the other hand, the reversionary clause clearly continued the interest of the Federal Government in the area prescribed. Had these interests which so quickly came into conflict been clearly recognized and the problems inherent therein been anticipated, much of the ensuing difficulty might have been avoided.

Closely associated with this conflict of interests, in truth stemming from it, was the fact that the governments concerned were never able to reach a lasting agreement on the policies to be pursued or on the methods to be used. This is made abundantly clear in the correspondence observed. While the State pursued one program of enforcement and settlement, the Federal Government pursued another, and as a consequence, the efforts of neither were effective.

Finally, it is apparent that both the federal and state governments were at fault in failing to recognize or in ignoring the sheer power and ruthlessness wielded and exercised by the lumber kings of the post Civil War era. Engaged as they were in jurisdictional squabbles and deceived as they were by the concept that our resources were inexhaustible, neither government found the time nor the will to take aggressive action for purposes of protecting the rich stands of timber which graced the grant. As a result vast quantities of logs and timber were annually stolen without any significant returns being realized and, what is worse, without any thought being given to the fact that an unreplenishable heritage was being plundered.

The significance of the foregoing account in terms of the current scene must surely be apparent. It clearly illustrates that a partnership between the state and federal governments for the control of natural resources cannot be created merely out of good intentions or pious talk. It reveals that a partnership by its nature is based on divided authority, and divided authority if not geared to common

objectives and clearly defined methods means total ineffectiveness if not utter chaos. It further shows how easily the power and importance of special interest groups may be overlooked, purposely or otherwise, by governments engaged in petty jurisdictional disputes. It finally portrays how certain groups are ever alert to take advantage of conflicts in authority and how effective they are in playing one source of power against the other for their own advantage.

All of this is not to suggest that the partnership approach lacks merit. It is rather intended to say that before we commence an extensive program based upon a concept of divided responsibility and control over our natural resources, we had better look long and carefully at the objectives to be achieved and methods and techniques to be employed. In addition we had better observe with critical eyes the special interests who most vociferously support such a program and ask ourselves the meaning of their enthusiasm. Only out of such considerations can be found a solution which will best protect and preserve the interest and welfare of the many.